OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: DEBORAH A. BUTLER
ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT:

This Field Service Advice responds to your memorandum dated March 30, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

X

ISSUE(S):
Whether the Service is authorized to abate interest under I.R.C. § 6404(e) when the tax relates solely to TEFRA partnership items.

CONCLUSION(S):
The Service is authorized to abate interest under I.R.C. § 6404(e) when the tax relates solely to TEFRA partnership items.

FACTS
X was a partner in a partnership that was audited under the TEFRA procedures. After the issuance of a Notification of Beginning Administrative Proceeding (NBAP) and a Notice of Final Partnership Administrative Adjustment (FPAA), the Tax Matters Partner filed a petition in the Tax Court. A settlement was reached and

decision documents were sent to the individual partners. X has filed a request for abatement of interest pursuant to I.R.C. § 6404(e) alleging that the Service failed to timely act.

LAW AND ANALYSIS

Under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub.L. No. 97-248, 96 Stat. 324, Congress mandated that in order to provide a uniform method of adjusting partnership items, the tax treatment of any partnership item must be determined on the partnership level. I.R.C. § 6221; Maxwell v. Commissioner, 87 T.C. 783, 787 (1986). Prior to the enactment of TEFRA, adjustments of partnership items were determined at the individual partners' level, resulting in duplication of administrative and judicial resources and inconsistent results between partners. Randell v. United States, 64 F.3d 101, 103 (2d Cir.1995).

I.R.C. § 6404(e)(1)(A)[1/] authorizes the Service to abate any assessment of "interest on any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act." Similarly, I.R.C. § 6404(e)(1)(B) authorizes the Service to abate any assessment of "interest on any payment of any tax described in section 6212(a) to the extent that any error or delay in such payment is attributable to such officer or employee being erroneous or dilatory in performing a ministerial act." Abatement is authorized only if no significant aspect of the delay can be attributed to the taxpayer's conduct and only after the Internal Revenue Service has contacted the taxpayer in writing with respect to the deficiency or payment. This section was enacted under the Tax Reform Act of 1986, Pub. L. 99-514, sec. 1563(a), 100 Stat. 2085, 2762 (1986), and applies to interest accruing on deficiencies for tax years beginning after December 31, 1978. Goettee v. Commissioner, T.C. Memo. 1997-454. I.R.C. § 6404(e) was amended by section 301 of the Taxpayer Bill of Rights 2 (TBOR 2), Pub. L. 104-168, 110 Stat. 1452 (1996), to provide that errors or delays attributable to *unreasonable* ministerial or *managerial* acts" may result in abatement of interest. However, the 1996 amendments to section 6404(e)(1) are effective only for tax years beginning after July 30, 1996. Woodral v. Commissioner, 112 T.C. 19, n.8 (1999).

At issue in this case is whether the term "interest on any deficiency" encompasses interest on a tax that is assessed as a result of TEFRA flow-through adjustments.

[1/] All statutory section references are to the Internal Revenue Code in effect for the taxable years at issue in this case.

A deficiency is defined in I.R.C. § 6211(a) as the amount by which the tax imposed by subtitle A or B or chapters 41, 42, 43 and 44 exceeds the excess of --

(1) the sum of

(A) the amount shown by the taxpayer on his return, if a return was made by the taxpayer and an amount was shown by the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over--

(2) the amount of rebates as defined in subsection (b)(2), made.

Section 6211(c) provides a special rule for partnership items:

(c) Coordination with subchapter C

In determining the amount of any deficiency for purposes of this subchapter, adjustments to partnership items shall be made only as provided in subchapter C.

The types of taxes referred to in § 6211(a) are income, estate, gift, and certain excise taxes. Nothing in § 6211 suggests that a income tax determined via the TEFRA partnership procedures cannot constitute a deficiency; in fact, the opposite is indicated. Section 6211(c) provides that when determining a deficiency for the purposes of subchapter B (Deficiency Procedures in the Case of Income, Estate, Gift, and Certain Excise Taxes) the adjustments to the partnership items shall be made only as provided in subchapter C (Tax Treatment of Partnership Items). Therefore, although the adjustment is determined at the partnership level, once the amount of income tax flowing from the partnership to the taxpayer is fixed, if the tax owed by the taxpayer exceeds the sum of the amount shown on his return (plus amounts previously assessed or collected, less the amount of rebates), the taxpayer will have a deficiency, but that deficiency is not subject to the "deficiency procedures."

This broad interpretation of a deficiency is supported by I.R.C. § 6225 which states that no assessment of a **deficiency** attributable to a partnership item may be made (and no levy or proceeding in any court for the collection of any such **deficiency** may be made) unless 150 days has elapsed and no Tax Court petition has been filed or if a petition has been filed, until the Court's decision becomes final. See also, Maxwell v. Commissioner, 87 T.C. 783, 788 (1986) which held "Respondent has no authority to assess a **deficiency** attributable to a partnership item until after the close of a partnership proceeding, (sec. 6225(a)), and may be enjoined from making premature assessments. Sec. 6225(b)." (emphasis added). Section 6225 and Maxwell both indicate that once the partnership proceeding is over the resulting liability falls within the literal definition of a deficiency.

Furthermore, we could find nothing in the Internal Revenue Code, including I.R.C. § 6230(a), that would restrict this interpretation of deficiency. Section 6230(a) states that subchapter B, except as provided, shall not apply to the *assessment or*

collection of any computational adjustment. It does not make the blanket statement that subchapter B shall not apply to any part of subchapter C. It simply makes it clear that the assessment and collection of computational adjustments are to be resolved by TEFRA procedures instead of deficiency procedures (unless the deficiency is attributable to affected items or nonpartnership items described in section 6230(a)(2)). Inasmuch as the subchapter B restriction in section 6230(a) places no limitation on defining a deficiency, a deficiency exists as long as the criteria in I.R.C. § 6211 are met. Accordingly, X's liability may constitute a deficiency and interest on X's deficiency may be subject to abatement under I.R.C. § 6404(e)(1)(A).

This field service advice is limited to determining whether the Service may abate interest on a tax related to a TEFRA adjustment. Our advice does not address whether X satisfies the remaining requirements of I.R.C. § 6404(e)(1)(A). Nevertheless, we note that loss of records is considered a managerial act[2/] and, for the years at issue, I.R.C. § 6404(e)(1)(A) does not authorize the Service to abate interest on a deficiency attributable to errors or delays by an employee of the Service in performing a managerial act.

Finally, if any portion of the request for abatement of interest is disallowed, Letter 2289 or Letter 2290 should be issued. If X does not want Appeals consideration or if X does not file a protest within 30 days, the Final Determination (Letter 3180 or Letter 3181) should be issued. If X disagrees with the Service's final determination, X will be able to petition the Tax Court, provided X meets the requirements of I.R.C. § 6404(i).

Please call if you have any further questions.

By: _____
SARA M. COE
Chief, Procedural Branch

[2/] See Treas. Reg. § 301.6404-2(b).